
(2009) 08 KAR CK 0077

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 20722 of 2009

Pankaj Mohan Associates and Others

APPELLANT

Vs

South Western Railway and Another

RESPONDENT

Date of Decision : 12-08-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Partnership Act, 1932 — Section 69

Citation : (2011) 1 KCCR 768

Hon'ble Judges : H.N. Nagamohan Das, J

Bench : Single Bench

Advocate : Sriyuths P.S. Rajagopal for Mahesh Wodeyar and R.P. Ugargol, for the Appellant; G.K. Andanimatt, for Caveator, for the Respondent

Judgement

H.N. Nagamohan Das, J.—This appeal is directed against the order dated 18.02.09 in Arbitration Application No. 1/09 passed by the Prl. District Judge, Dharwad dismissing the petition filed u/s 9 of the Arbitration and Conciliation Act, 1996 (for short, the Act).

2. Appellant is a partnership firm having its head office at Delhi. The Appellant entered into an agreement with the Respondents on 25.10.07 for leasing of parcel space by Train No. 2627/28 (Karnataka Express) plying between Bangalore-New Delhi-Bangalore. The period of lease is for three years commencing from 08.06.2007. The agreement contains as many as 20 paras governing the transaction between the parties.

3. Para 15.5 of the agreement specifies the nature of action to be taken for overloading of the parcel wagon According to the Respondents, the Appellant violated Para 15.5 of agreement of lease on 14 different occasions resulting in a serious threat to the safety of parcel wagon. Consequently the Respondents by their order dated 16.12.08 terminated the agreement by invoking Para 28.1 of the agreement of lease. Aggrieved by this termination of lease by the Respondents, the Appellants filed a writ petition before the Delhi High Court in

W.P.(C) No. 9342/07 and obtained an interim order of stay of termination order dated 16.12.2008. Subsequently this W.P. (C) No. 9342/07 came to be disposed as withdrawn on 19.12.2008 with liberty to take recourse to alternative remedy in accordance with law. Further the operation of the stay order granted by the Delhi High Court was continued till 25.12.2008. Consequently the Appellants filed Arbitration Application No. 1/09 u/s 9 of the Act before the Prl. District Judge at Dharwad and obtained an interim order staying the operation of the termination order dated 16.12.2008. The Respondents entered appearance before the District Judge at Dharwad in A.A. No. 1/09 and filed objections opposing the claim of Appellants. The District Judge after hearing both the parties, passed the impugned order on 18.01.09 dismissing the petition filed by the Appellants. Hence, this appeal by the Appellants.

4. Sri Rajagopal, learned Senior Counsel for the Appellants contend that the District Judge committed an illegality in dismissing the petition on the ground that at the instance of Respondents an Arbitrator is appointed to go into the dispute between the parties and the arbitration proceedings have commenced u/s 21 of the Act, the arbitrator is seized of the matter and therefore, the Court cannot grant stay. Learned Senior Counsel contends that the District Judge failed to consider the scope of Section 9 of the Act. The reasoning of the District Judge that in case of breach of obligation under a contract, the proper remedy is damages and not enforcing specific performance of the contract is illegal and perverse. The District Judge committed an error in holding that on 14 occasions, the Appellants violated the terms of lease by overloading the wagon and resulting in danger to the safety and security of railway passengers. This finding of the District Judge is contrary to the material available on record. Further, the District Judge committed an error in not following the law laid down by the Supreme Court in *Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd.*, Reliance is also placed on the following decisions:

1. AIR 2005 Kar 94 (*Globe Co-generation Power Ltd v. Sri Hiranyakeshi Sahakari Sakkere Karkhane Niyamit*)

2. *M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd.*,

3. *Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc.*,

4. *Rodemadan India Limited Vs. International Trade Expo center Limited*,

5. Per contra, Sri Andanimath, learned advocate for the Respondents support the impugned order. He contends that Appellant is not a registered firm and therefore, it is not entitled to maintain the petition before the District Judge and this Court. In case of breach of terms of contract, the only remedy available to the Appellant is to claim damages and not to insist upon the specific performance of contract. Since the arbitrator is appointed at the instance of Respondents in relation to the controversy between the parties, the Civil Court cannot entertain the petition u/s 9 of the Arbitration Act. Reliance is placed on the following decisions:

1. Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others,
2. Ramchandra Tanwar Vs. Ram Rakhmal Amichand and Another,
3. Oil and Natural Gas Corporation Ltd., Mumbai Vs. Streamline Shipping Co. Pvt. Ltd.,
4. Orissa Manganese and Minerals (Pvt.) Ltd. Vs. Adhunik Steel Ltd.,
5. Her Highness Maharani Shantidevi P. Gaikwad Vs. Savjibai Haribai Patel and Others etc. etc.,
6. 2006 SAR (Civil) 562 (Seena Arshad Zaheer and Ors. v. Municipal Corporation of Greater Mumbai and Ors.)
7. Smt. Ganga Bai Vs. Vijay Kumar and Others,
6. Heard arguments on both the side and perused the entire appeal papers.

7. The learned Counsel for the Respondents contend that petition filed by the Appellants is not maintainable since the Appellant-firm is not a registered firm in view of the Bar u/s 69 of the Indian Partnership Act, 1932. This contention of the learned Counsel for the Respondents is unacceptable to me. The petition is filed by the firm represented by its two partners. In the petition it is stated that Appellants' firm is a registered partnership firm. The name of the firm and the names of its partners are mentioned in the causetitle to the petition filed before the District Judge. With the petition, the Appellants have produced the partnership deed specifying the name of firm and the names of two partners. The Appellants have also produced Form-B under Rule 8 issued by Registrar of firms at Delhi stating that the name of Appellant's firm has been entered in the Register of Firms as 852/86 dated 7.4.1986. By considering this material on record, the District Judge held that the Appellant-firm is a registered firm and therefore they can maintain the petition u/s 9 of the Arbitration Act and Conciliation Act, 1996. This finding of the District Judge is in accordance with law and the same is supported by evidence on record.

8. Learned Counsel for the Respondents contended that in the acknowledgment issued by Registrar of Firms at Delhi, the name of partnership firm alone is mentioned and the names of partners is not mentioned. Firstly, this contention is not pleaded by the Respondents in the objections statement filed by them before the District Judge. Therefore, at this stage, it is not open for the Respondents to contend that the names of partners are not mentioned in the acknowledgment and therefore, they cannot maintain the petition. As already stated in the causetitle to the petition before the District Judge, the name of firm and the names of two partners are mentioned. Further, the name of the firm and the name of partners in the partnership deed tallies with the causetitle. Even the acknowledgment issued by the Registrar of Firms at Delhi specifies the name of firm and the same tallies with the name of the firm in the causetitle. This material on record establishes the fact that Appellant-firm is a registered firm

and the same is represented by its two partners as mentioned in the causetitle to the petition. Therefore, I decline to accept this contention of learned Counsel for the Respondents.

9. The reasoning of the District Judge that an arbitrator is appointed to go into the controversy between the parties and is seized of the matter and the Appellants are at liberty to move before the Arbitrator for an interim order is illegal and perverse. Section 9 of the Act reads as under:

Interim measures, etc. by Court.--A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court

(i)

(ii)

10. A reading of Section 9 of the Act manifestly makes it clear that a party may move the Court for interim measure before the commencement of arbitral proceedings or during arbitral proceedings or at any time after making of the arbitral award before it is enforced. In the instant case, the Respondents terminated the contract with Petitioners on 16.12.2008. Immediately thereafter the Appellants filed a writ petition before the High Court of Delhi in W.P. No. 9342/2007 for interim order on 17.12.2008. This W.P. No. 9342/2007 came to be disposed as withdrawn with a liberty to take recourse to appropriate remedy in accordance with law. Further, the High Court of Delhi stayed the termination notice dated 06.12.2008 upto 25.12.2008. Thereafter, the Appellants moved the District Court at Dharwad by filing a petition u/s 9 of the Act and the same came to be numbered as Arbitration Application No. 1/08. The District Judge vide order dated 22.12.2008 directed both the parties to maintain status-quo up to 02.01.2009. This interim order came to be extended from time to time till the disposal of the petition on 18.02.2009. This material on record establishes the fact that Appellants approached for interim order before the commencement of arbitral proceedings. Further, it is seen from record that Appellants had the benefit of interim order before the commencement of arbitral proceedings and also thereafter. Therefore, the reasoning of the District Judge that Appellants can move an application for interim order before Arbitrator and not before the competent Civil Court is illegal and perverse. The Court is having the power to grant Interim orders either before the commencement of arbitral proceedings or during arbitral proceedings or after the award is passed and before it is enforced. Merely because an arbitrator is appointed, the Court will not loose its power to grant Interim orders in deserving cases.

11. The District Judge held that if there is breach of contract by the Respondents, then the remedy to the Appellants is to seek damages and not injunction. It is further held that grant of injunction will amount to grant of specific performance of agreement or in the alternative it amounts to creation of a new contract. This reasoning of the District Judge is illegal and perverse. It is settled position of law

that whenever there is breach of contract, three remedies are available and they are specific performance of agreement, injunction and damages. It is for the Court to examine and to find out which relief will be appropriate in the facts and circumstances of a given case. In the instant case, the District Judge has not examined whether the remedy of injunction is inappropriate in the facts and circumstances of this case. The agreement between the parties was entered on 08.06.2007. The period fixed under the agreement of lease is three years. Further, Para 20.1 of the agreement provides for extension of lease by two more years subject to enhancement of lease rate by 25%. The termination of agreement on the ground that the Appellants have violated Para 15.5 of the agreement on 14 different occasions is not a termination simplicitor. This termination of agreement will have far reaching civil consequences on the Appellants and the same is a stigma on them. If the reason shown by the Respondents in this order of termination is found to be false and arbitrary, then the appropriate remedy is to stay the order of termination and to restore the parties to earlier position. In the circumstance, damages is not the appropriate remedy. Hence, the finding of the District Judge is liable to be set aside.

12. In the impugned order, the District Judge held that on 14 occasions, the Petitioners by violating the terms of agreement of lease overloaded the goods wagon resulting in danger to the safety of public. Again this reasoning of the District Judge is contrary to the evidence on record. In the termination order dated 16.12.2008 it is stated that on 14 different occasions, it was found excess overloading of parcel van by the Petitioner and the same is dangerous to the safety of passengers travelling in it. The Appellants have produced communication dated 01.04.2009 issued by the Respondents showing the details of violations made by the Petitioner on 14 different occasions and the same read as under:

Sl. No, Date VPU/VPHNo. Gross Weigh ment Details (QTIS) Permissible weight (QTIS) Excess Weight Found (QTIS) % of Violation Punitive Charges Collected (in Rs.)

1. 04.09.07 WC 04827 251.60 250.00 1.60 0.64 10733
2. 08.10.07 ER 07833 250.20 250.00 0.20 0.08 5720
3. 12.10.07 NW 06827 252.20 250.00 2.20 0.88 12890
4. 15.10.07 WR 04826 250.80 250.00 0.80 0.32 7870
5. 18.10.07 ER 07833 251.00 250.00 1.00 0.40 8586
6. 19.10.07 NR 00901 251.00 250.20 1.20 0.48 9305
7. 22.10.07 CR 05828 254.00 250.00 4.00 1.60 21500
8. 01.12.07 NR 07841 252.60 250.00 2.60 1.04 14323
9. 04.01.08 CR 01837 254.20 250.00 4.20 1.68 20065

10. 06.01.08 CR 02837 254.80 250.00 4.80 1.92 22215
11. 14.01.08 SW 07840 255.00 250.00 5.00 2.00 22930
12. 23.01.08 NR 05830 269.80 250.00 19.80 7.92 76003
13. 08.02.08 NR 05830 256.00 250.00 6.00 2.40 26516
14. 11.02.08 WR 05828 252.40 250.00 2.40 0.96 13607

However, it is observed that the date of punitive charges collected on 29.11.07 at Sl. No. 8 and on 22.01.08 at Sl. No. 12 does not appear to be correct as No. VPU/ VPH arrived at NDLS on those dates, whereas the date of arrival at NDLS i.e. 01.12.07 and 23.01.08 respectively and other particulars are same as mentioned in your statement.

13. A reading of the above communication makes it clear that the violations mentioned at Sl. Nos. 8 and 12 does not appear to be correct even according to the Respondents. The percentage of violations in respect of remaining 12 violations is below 3% on every occasion. Para 15.5 of the lease agreement relating to overloading and which is relevant for the purpose of this case reads as under:

Overloading Charge/Penalty i) Up to 3% Normal lumpsum leased freight for the excess weight only, no penalty. ii) More than 3% to 5% Normal lumpsum leased freight for the excess weight as freight charges. Penalty of 6 times Rajdhani freight for the entire amount of excess weight. iii) More than 5% a) Normal lumpsum leased freight for the excess weight as freight charges. Penalty of 6 times Rajdhani freight for the entire amount of excess weight + Rs. 5,000 for each of first 3 occasions. b) Cancellation of lease for 4th default in addition to penalty as mentioned at (a) above.

14. A reading of the above clause in the lease agreement specifies if the overloading is more than 5%, the Petitioner is liable to pay penalty of six times and Rs. 5,000/- for first three occasions, Cancellation of lease is provided for the fourth default in addition to the penalty levied on the first three occasions. No material is placed on record to show that Petitioner violated the lease agreement by overloading the parcel van more than 5% at any time. Therefore, on the face of it, the reason mentioned in the order of termination is false and the same is arbitrary exercise of power by the authorities of the Respondents.

15. The Respondents by invoking Para 23.1 of the lease agreement terminated the contract and the same reads as under:

Para 23.1 The Railway Administration shall have the right to terminate the operation of lease contracts/agreement for any reason whatsoever after serving one month's notice to the leaseholder. Railway shall also reserves the right to terminate the contract without giving any notice at any time for whatsoever reason as a punitive measure or breach of agreement by the leaseholder or in case of operational exigencies or it is necessary to do so in public interest,

However, such instantaneous termination of contract by railway administration should be followed by a written intimation of breach of contract within 3 working days of termination

16. Para 23.1 of the lease agreement contains two parts. The first part specifies that the Respondents have the right to terminate the operation of the lease agreement after serving one month's notice to the leaseholder. The second part specifies that without giving any notice, the Respondents have the right to terminate the lease agreement as a punitive measure for breach of agreement by lease holder or in case of operational exigencies or it is necessary to do so in public interest. In the instant case, the Respondents specified in their termination order that for breach of agreement by the Appellants, the operation of the lease agreement came to be terminated without issuing prior notice. The Respondents while terminating the agreement without issuing notice shall be fair, reasonable, bona fide and not arbitrary. But in the instant case, the authorities of the Respondents acted arbitrarily and contrary to the term of agreement, The order of termination is passed recklessly, negligently and without application of mind. The authorities of the Respondents shall remember that Indian Railways is an instrumentality of State Under Article 12 of the Constitution of India. The authorities of the State shall act within the ambit of rule of law and not arbitrarily.

17. For the reasons stated above, the following

ORDER

- i) The appeal is hereby allowed.
- ii) The impugned order dated 18.02.2009 in Arbitration Application No. 1/2009 passed by the Prl. District Judge, Dharwad, is hereby set aside.
- iii) The petition filed by the Petitioner u/s 9 of the Act in A.A. No. 1/2009 on the file of Prl. District Judge, Dharwad, is hereby allowed.
- iv) The order of termination dated 16.12.2008 passed by the Respondents is hereby stayed.
- v) Both the parties are restored to the earlier position under the agreement dated 25.10.2007 subject to terms and conditions contained therein.